

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION**  
**OF SOUTH CAROLINA**  
**DOCKET NO. 2006-327-WS**

Office of Regulatory Staff,	)	
Petitioner,	)	
v.	)	RESPONSE TO MOTION
Wyboo Plantation Utilities, Inc.	)	
<u>Respondent.</u>	)	

Pursuant to 26 S.C. Code Ann. Regs 103-829 and other applicable rules of the Public Service Commission of South Carolina ("Commission"), the Office of Regulatory Staff ("ORS") respectfully files this Response to Wyboo's Motion for Approval of Water Tap Fee To Conform to Existing Rate, *Nunc Pro Tunc*. Specifically, Wyboo seeks to have the Commission apply the water tap fee approved in Order No. 2007-138 retroactively. In response to Wyboo's Motion, ORS submits the following:

1. On or about October 20, 2006, ORS filed a Petition alleging that Wyboo had engaged in the practice of charging and collecting unauthorized and unapproved rates. As part of an audit, ORS had uncovered evidence that Wyboo was charging water tap fees, impact fees, cut-on fees, cut-off fees, and "illegal water use" fees of certain customers although no water tap fee, impact fee, cut-on fee, cut-off fee, or "illegal water use" fee had been approved by the Commission. On or about December 28, 2006, ORS amended its Petition seeking certain relief: (1) the opportunity to present evidence to support the claim that certain unapproved fees were assessed by Wyboo; (2) a requirement that customers of Wyboo be notified of the pending

action; (3) that Wyboo submit an Answer to the Petition; (4) that the customer bills be adjusted pursuant to Commission Regulations 103-533 and 103-733; and (5) for any other action or relief deemed necessary by the Commission.

2. ORS is charged by law with the duty to represent the public interest of South Carolina in matters before the South Carolina Public Service Commission pursuant to S.C. Code Ann. §58-4-10 et seq. (Supp. 2007). As contained in Title 58, Chapter 4 regarding the ORS, “public interest” means

.... a balancing of the following:

- (1) concerns of the using and consuming public with respect to public utility services, regardless of the class of customer;
  - (2) economic development and job attraction and retention in South Carolina; and
  - (3) preservation of the financial integrity of the state’s public utilities and continued investment in and maintenance of utility facilities so as to provide reliable and high quality utility services.
- S.C. Code Ann. §58-4-10(B) (1) through (3) (Supp. 2007).

3. On July 31, 2008, ORS filed the testimony of Mr. Willie J. Morgan along with those exhibits delineating the unauthorized charges assessed by Wyboo and identified by ORS, including, but not limited to, a water tap fee ranging from \$300 to \$450. Why some customers were charged \$300 and others \$450 is not known to ORS. In any event, this “water tap fee” has never been approved by the Commission, and Wyboo does not dispute this fact.

4. Wyboo argues in its Motion that because the Commission approved a higher rate for a water tap fee than the unapproved charge assessed by Wyboo is grounds for retroactive application of the Commission approved charge. On February 26, 2007, in Order No. 2007-138 at page 20, the Commission approved a water tap fee of \$825 for a 3/4 inch connection, \$965 for a 1 inch connection, and \$1,145 for a 2 inch connection. These amounts include the installation of a meter. According to the information provided by the utility, there are only

approximately 28 meters installed on the system at Wyboo. Our review shows that at least 97 customers were billed a water tap fee. In the Motion, Wyboo appears to seek the Commission's approval to "conform water tap fees charged prior to Order," to the water tap fee approved by the Commission in Order No. 2007-138. The granting of this request for relief would require retroactive billing to Wyboo customers.

5. Wyboo provides no legal citations to support its request that the Commission can and should retroactively apply a rate; in this case, a water tap fee. It is well settled law that "rate-making is a prospective rather than a retroactive process." *South Carolina Elec. And Gas. Co. v. Public Service Commission*, 275 S.C. 487, 490, 272 S. E.2d 793, 795 (1980).

6. Wyboo argues that because its customers received a benefit from the installation of the water tap, that it would be unfair and unjust for Wyboo to refund the unauthorized water tap fee charges.<sup>1</sup> The Commission has the authority to order a reparation for a past charge in excess of the Commission approved rate. (26 S.C. Code Ann. Regs. 103-533). And, the S.C. Supreme Court has stated: "The Commission has no more authority to require a refund of monies collected under a lawful rate than it would have to determine that the rate previously fixed and approved was unreasonably low, and that the customers would thus pay the difference to the utility." *South Carolina Elec. And Gas. Co.*, 275 S.C. at 491. In the instant case, there was no approved water tap fee. Just as the Commission would not go back and set a higher rate because the approved rate was unreasonably low, nor should the Commission go back and establish a fee that did not exist. Both the courts and the legislature have established that it is inappropriate to retroactively set a rate that was not previously approved by the Commission.

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<sup>1</sup>It is ORS's understanding that all taps located in the Deercreek Community were installed by the developer. This would include all taps on Blue Heron Point. See Attachment A, information supplied by Bill Gregory to Willie Morgan.

7. Indeed, the legislature specifically provided the Commission with the authority to “correct improper rates and the like” on a *prospective* basis. See S.C. Code Ann. §58-5-290 (1976 & Supp. 2007) stating “...the Commission shall, subject to review by the courts, as herein provided, determine the just and reasonable fares, tolls, rentals, charges or classifications, rules, regulations or practices to be thereafter observed and enforced and shall fix them by order as herein provided. (Emphasis added). This Commission in its Order 2007-138 did just that. The Commission established a water tap fee to be applied on a prospective basis, and as noted by Wyboo, at a higher rate. The Commission should not, as requested by Wyboo, apply a rate retroactively.

8. Additionally, Wyboo improperly asserts its quantum meruit cause of action before the Commission when proper jurisdiction lies with the circuit court or the master in equity. The Commission’s jurisdiction does not extend to equitable causes of action. The Legislature invested jurisdiction of equitable claims in masters in equity and circuit court judges. See S.C. Const. Art. 5 § 11; S.C. Code Ann. § 14-11-15 (Supp. 2007); and S.C. Code Ann. § 14-5-350 (Supp. 2007).

9. As to the intent of Wyboo and whether the water tap fee and/or the other unapproved charges were a result of “mistaken belief” is a determination for this Commission to make at hearing.

10. Finally, the Commission specified in Paragraph 2 of Order No. 2007-138, that Wyboo shall “correct all violations of the statutes, rules and regulations pertaining to water and sewer utilities and shall bring itself into full compliance with all applicable statutes, rules and

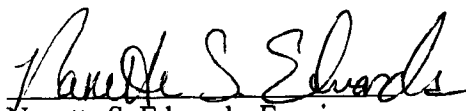
regulations.”<sup>2</sup> Wyboo comes to this Commission requesting relief from the requirement to refund its customers for an unapproved charge and yet it has not come into full compliance with the statutes, rules, and regulations pertaining to water and sewer utilities.

WHEREFORE, ORS prays that the Honorable Commission:

1. Deny the Motion for Approval of Water Tap Fee To Conform to Existing Rate, *Nunc Pro Tunc* on the grounds that it seeks this Commission to retroactively apply a rate that which would result in an increase to Wyboo customers;

2. Require Wyboo to refund the unauthorized water tap fee charges assessed to its customers and otherwise come into compliance with Commission regulations including but not limited to the filing of a performance bond and return of all fees and charges not authorized or approved by the Commission; and

3. Provide any additional action or relief which the Commission may deem appropriate.



Nanette S. Edwards, Esquire  
Office of Regulatory Staff  
1401 Main Street, Suite 900  
Columbia, SC 29201  
Phone: (803) 737-0800  
Facsimile: (803) 737-0895  
nsedwar@regstaff.sc.gov

November 17, 2008

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<sup>2</sup> Wyboo has yet to file a performance bond in compliance with the Commission's rules and regulations, and ORS has not been able to confirm that the other unapproved fees and charges identified in Mr. Morgan's testimony and exhibits have been refunded.

ATTACHMENT A

Memo

October 19, 2006

To: Mr. Willie Morgan  
Office of Regulatory Staff  
Fax 803-737-0801

From: Bill Gregory  
Contract Developer of Wyboo Plantation-Retired

I have reviewed the responses of John F. Beach to your request Dated October 13, 2006.

Section 2.22

The response says "During construction of the systems, the original construction company did not install Elder Valves anywhere within the utility system".

This is a total misrepresentation. According to Timmons Engineering plans approved by DHEC, Barrett Construction installed a 2" brass valve in the sewer collection line at every patio home. James Septic Tank Company has a package price to furnish all labor and material to install the complete STEP tank system on lot, including Electric hook up and drain line into 2" valve at collection line. This cost is included in the contractor's price to owner. Wyboo Plantation Utilities is not involved in this installation and has no cost.

It appears to me that if a disconnection is required for lack of payment, both water & sewer would be involved. When you cut off the water you have cut off the sewer!!

Section 2.24

The letter provided you dated May 7, 2002 from Wayne Stokes, Manager Construction Permitting Section of DHEC, to Mark Wrigley, Wyboo Plantation Utilities clearly states DHEC's regulation, period.

Section 2.29

The statement that the utility has plans on the drawing board for an upgrade of the wastewater treatment plant for at least \$1.2 million dollars is completely unreasonable and out of line. The utility needs to supply the requirements for the approved franchise area. This would be a fraction of the stated cost.

**RECEIVED**

OCT 25 2006

ORS  
J,T,W,W/W

Springdale Builders  
Will Bomar Road  
Greer, SC 29651

Mr. Willie J. Morgan P.E.  
Program Manager for Water & Waste Water  
South Carolina office of Regulatory Staff  
1441 Main Street  
Suite 300  
Columbia, SC 29201

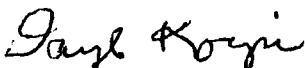
Dear Sir;

I have been advised that Mark Wrigley, Owner of Wyboo Plantation Utilities, Inc. Has charged my company unauthorized tap fee rates for water and sewer at Deercreek P Plantation in Clarendon County.

Enclosed are copies of two checks payable to Wyboo Plantation Utilities, Inc. Totalling \$9,000.00 representing 20 water taps @ \$450.00 each. One check payable to Wrigley and Associates, Inc. for \$8,032.80 representing 12 sewer taps @ \$650.00 Each = \$7,800.00 plus \$232.80 for water usage.

I would appreciate any help you can give me to recoup these unauthorized Charges.

Very truly yours,

  
Daryl Korpi-Owner

SPRINGDALE BUILDERS, INC.  
12111 DOWNTOWN  
SUITE 200  
GREENSBORO, NC 27409

THE NATIONAL BANK OF SOUTH CAROLINA  
GREENSBORO, SOUTH CAROLINA  
910-460-0000

3195

2-28-05

PAY TO THE ORDER OF WYBOD PLANTATION UTILITIES INC \$ 5400.00

DOLLARS

AMOUNT IN FIGURES 12-1200000

*[Signature]*

CK 3195 \$5,400.00 3/1/2005

SPRINGDALE BUILDERS, INC.  
12111 DOWNTOWN  
SUITE 200  
GREENSBORO, NC 27409

THE NATIONAL BANK OF SOUTH CAROLINA  
GREENSBORO, SOUTH CAROLINA  
910-460-0000

3289

3-22-05

PAY TO THE ORDER OF WYBOD PLANTATION UTILITIES \$ 3600.00

DOLLARS

THREE THOUSAND SIX HUNDRED

AMOUNT IN FIGURES 3600.00

*[Signature]*

CK 3289 \$3,600.00 3/25/2005



10/24/2006 11:57 FAX 864 895 8012  
10/24/2006 10:52 864-958-7506

SPRINGDALE/SKYDALE  
NBSC - GREER SC

002  
PAGE 02/02

Page 1 of 1

<b>SPRINGDALE BUILDERS, INC.</b> 156 WILL BOMAR RD. GREER, SC 29651 (864) 895 8018		<b>THE NATIONAL BANK OF SOUTH CAROLINA</b> GREER, SOUTH CAROLINA 87-86 632		4486
PAY TO THE ORDER OF		Wrigley & Associates, Inc.		1/30/2006
Eight Thousand Thirty-Two and 80/100		\$ 8,032.80		DOLLARS
Wrigley & Associates, Inc. 1309 Cherryvale Dr. Sumter, SC 29154		<i>Donna Kellhauer</i>		
MEMO <i>Deer Creek water septic fees</i>				

02/03/2006		FOR DEPOSIT ONLY	
Wrigley & Associates, Inc. 1309 Cherryvale Dr. Sumter, SC 29154		6	

Date: 02-03-2006 Sequence: [REDACTED]  
Amount: [REDACTED] Employee: [REDACTED]  
MIC: [REDACTED] [REDACTED] [REDACTED]

**BEFORE**  
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**SOUTH CAROLINA**  
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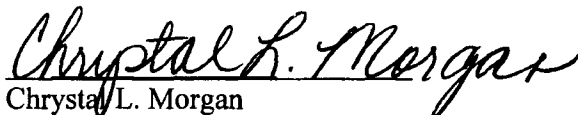
IN RE:

Petition of the Office of Regulatory Staff     )  
Regarding Wyboo Plantation Utilities,         )  
Incorporated's Collection and Charging of     )  
Unauthorized and Unapproved Rates            )

**CERTIFICATE OF SERVICE**

This is to certify that I, Chrystal L. Morgan, an employee with the Office of Regulatory Staff, have this date served one (1) copy of the **RESPONSE TO MOTION** in the above-referenced matter to the person(s) named below by causing said copy to be deposited in the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below:

Richard L. Whitt, Esquire  
Austin & Rogers, P.A.  
Post Office Box 11716  
Columbia, SC, 29201

  
Chrystal L. Morgan

November 17, 2008  
Columbia, South Carolina